IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1262

DON A. JENKS,

Petitioner,

vs.

CAROLYN R. JUDD,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

ROBERT W. HUGHES,
80 West Louise Avenue,
Salt Lake City, Utah 84115,
(801) 485-5151,
Attorney for Petitioner.

Of Counsel:
RICHARD T. OLSON,
12311 Chapman Avenue,
Suite 201,
Garden Grove, Calif. 92640,
(714) 530-2733.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Petition for Writ of Certiorari to the Supreme Court of the State of California.

Don A. Jenks prays that a writ of certiorari issue to review the decision of the Second Appellate District, Division Two, in the Court of Appeal of the State of California rendered on September 21, 1973 and affirmed by the Supreme Court of the State of California on December 15, 1973. (Opinions not published.)

Opinions Below.

The opinion of the Second Appellate District, Division Two, in the Court of Appeal of the State of California is unreported and is set forth in Appendix A. (Pp. 1 to 6.)

Jurisdiction.

This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

The Questions Presented.

1. Does the Petitioner have a basic right guaranteed him by the Constitution of the United States of

America whereby the trial judge should have refused to permit or hear illegal evidence, which evidence, at the time received, was in violation of the penal laws of the State of California and the criminal laws of the United States of America?

2. To enforce such right, does the due process clause of the Constitution guarantee Petitioner that he receive a fair trial in a state court proceeding and require the exclusion of illegal evidence?

3. Does public policy require that Petitioner's right of privacy be respected, notwithstanding that the mechanical recording of the private conversation took place in a lawyer's office who was attempting to enforce his client's rights and who made said mechanical recording surreptitiously and without Petitioner's knowledge or consent during conversations engendered for the purpose of settling his client's claim?

4. Does the commission of a crime occur when an oral communication, obtained in violation of Federal statutes, to wit: 18 U.S.C., Section 2511, subsections (b), (c), and (d), is published in a civil court of law and should such oral communication, reduced to a tape transcript, as a matter of due process, be determined "illegal evidence?"

Statutory Provisions Involved.

The statutes involved are 18 U.S.C., Section 2511(1)(b)(iii); (c) and (d), which provide:

> "(1) Except as otherwise specifically provided in this chapter, any person who—
>
> (b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use, any electronic, mechanical, or other device to intercept any oral communication when—

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know, that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know, that the information was obtained through the interception of a wire or oral communication in violation of this subsection;"

Statement of the Case.

On July 27, 1967 Respondent filed an action against Petitioner, and others, for money had and received, fraud and rescission. Trial was held in the Los Angeles County Superior Court on February 4, and 7, 1972.

The Respondent sought special damages in the sum of $6,000, plus interest thereon at the rate of 7% per annum from April 14, 1967, exemplary damages in the sum of $20,000, plus costs of suit, and reasonable attorney's fees.

On or about March 23, 1967 one Morgan, Defendant, entered into a written contract with Respondent whereby Morgan agreed to sell to Respondent 6,000 shares of Thorium Reactor Corporation (hereafter refered to as "Thorium") stock for the sum of $6,000, which amount was paid by Respondent to Morgan. Mor-

gan delivered to Respondent 3,000 shares of stock, but never delivered the remaining paid for 3,000 shares.

Two witnesses appeared at trial, namely: Petitioner and Respondent. Respondent made no reference of Petitioner throughout her testimony and all of her dealings were with Morgan and her own personal friends.

Petitioner testified at the time of trial that he had given 2,000 shares of Thorium stock to Morgan in December of 1966, and thereafter, sold to Morgan an additional 2,000 shares of Thorium stock for the sum of $2,000.

The Thorium shares given and sold by Petitioner to Morgan were Petitioner's own personal stock and evidence at the trial did not disclose any connection with Petitioner's stock aforesaid which was sold and given to Morgan, and the 3,000-share certificate of Thorium stock delivered to Respondent.

At the trial, Respondent's attorney introduced a tape recording made in his office some time in August of 1967 between himself, Petitioner and the said Morgan. Petitioner was not aware that his conversation with Respondent's attorney was being taped, nor did he give his consent in any form to having his conversation taped. The receipt and admission by the trial judge of the surreptitiously obtained tape recording was the decisive factor to bind Respondent to an inferred fraud theory for the Court of Appeal stated in its opinion as follows:

> "Before being served with the complaint Morgan and Jenks met with Judd's attorney at the attorney's office. Jenks told the attorney he would help Morgan get the money to pay Judd back: 'I gave him the stock in the first place. * * *

> The only reason I'm interested in getting him out of it is so that I won't get in trouble. * * * I just don't want any damned investigation with the SEC. * * * I lent him stock to help him out, see, but he gave me a note at the rate of a buck a share. * * * I don't want any trouble because I'm going to raise money for this company. * * * I'm trying to help this guy get the dough and then I want my stock back, that's all.'" (Opinion, p. 4.) (Quotation taken directly from the tape recording made by Respondent's attorney without consent of Petitioner.)

The tape recording by Respondent's attorney was made in August of 1967. In August of 1967 the California Legislature enacted Section 632 of its Penal Code (See Appendix C) and in June of 1968, Title 18, Section 2511 of the U.S.C. was enacted. Although the statutes were not in effect at the time of the tape recording, the Federal statute Title 18, Section 2511, subsections (c) and (d) were in effect at the time of trial and would apply.

Counsel for Respondent in introducing the surreptitiously obtained tape recording procured in his office in August of 1967 into court did so willfully in violation of subsections (b), (c), and (d) of Title 18, Section 2511, U.S.C. Annotated.

The violation complained of in Title 18, Section 2511(1)(b)(iii) of U.S.C. Annotated is borne out by reason of the fact that the Stenorette tape recorder used in making the surreptitious recording was manufactured in Germany and shipped through foreign commerce to the United States of America.

REASONS FOR GRANTING THE WRIT.

Petitioner submits that this writ should be granted on three (3) independent grounds, namely:

1. Citizens of the United States, pursuant to the Fourteenth Amendment to the Constitution, under the due process clause, shall not be deprived of their property without due process of law and due process requires that citizens receive a fair trial predicated upon the admission or exclusion of legal or illegal evidence.

2. Public policy dictates that an individual's right of privacy, including private conversations, be free from unauthorized mechanical recordation.

3. Where the publication of evidence in a court of law during trial constitutes a felony, such evidence is illegal and inadmissible.

Due Process.

This Court has many times recognized the importance of due process guaranteed under the Fourteenth Amendment to the Constitution of the United States of America in both criminal and civil actions. Due process simply means "fair process" under the attendant circumstances. In Petitioner's situation, due process requires that he receive a fair trial. A fair trial requires that the trier of the fact, in the instant case, the trial judge, receive and act upon legal evidence. Both the trial court, the Court of Appeal and the Supreme Court of the State of California should have acted *sua sponte* to exclude illegal evidence, to wit: an unauthorized taped recording of a private conversation. See *Asbury v. Oliver*, D.C. Va. 1970, 318 F.Supp. 44, where the admissibility of evidence raises the Con-

stitutional question of whether a party received a fair trial. Also, see *United States ex rel. Smith v. Reincke*, C.A. Conn. 1965, 354 F.2d 418, certiorari denied, 86 S.Ct. 1896, 384 U.S. 993, 16 L.Ed. 2d 1010, where it was held a conviction supported on knowing use of perjured testimony is violative of the requirements of a fair trial.

Surely civil trials have the same degree of requisite integrity as to evidence received as in criminal trials. The receiving of perjured testimony, in itself a crime, is no less flagrant than in the instant case wherein the willful publication of a protected conversation is received in a trial as evidence, which publication is in violation of both state and federal law.

In *State v. Kahinu*, Hawaii 1972, 498 P.2d 635, and *Workman v. Cardwell*, D.C. Ohio 1972, 338 F. Supp. 893, injection of irrelevant references to defendant's prior arrests, convictions or imprisonment, where such testimony was intentionally introduced through overzealousness and where introduction of Constitutionally infirm convictions and use of such convictions as a trial for a subsequent offense was violative of due process.

Public Policy.

Section 630 of the Penal Code of California sets forth the intent of the Legislature as follows:

> "The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual increasing use of such devices and techniques has created a serious threat to

the free exercise of personal liberty and cannot be tolerated in a free and civil society.

"The Legislature by this chapter intends to protect the right of privacy of the people of this State."

The Legislative bodies of government, in the instant case, California, have clearly set forth public policy requirements pertaining to individual right of privacy whereby all citizens are free from invasion into their private affairs and private conversations by the mechanical means of recordation.

Unlawful Publication of Surreptitiously Taped Private Conversation Is Illegal Evidence.

United States Code, Annotated, Section 2511(1)(c) and (d) provide as follows:

"(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know, that the information was obtained through the interception of a wire or oral communication in violation of this subsection; and

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know, that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 and imprisoned not more than five years, or both."

Thus, Congress has enunciated a serious invasion of a person's right to privacy and the consequences for such reprehensible activities by the wrongdoer. In the

instant case, counsel for Respondent, though not technically breaching any law in taping the conversation in August of 1967, appears to have committed a felony under subsections (c) and (d) above by the introduction of the surreptitiously obtained tape recording at the trial herein.

The fact that Respondent's attorney was a party to the conversation which was tape recorded and thereby consented to the taping by reason that he prepared the operation of the Stenorette tape recording device, controlled its mechanism and preserved the tape recording, does not transcend the fact that the other parties to the private conversation, to wit: Petitioner and Morgan, were not aware that the conversation was being recorded by Respondent's attorney, and thus places Respondent's attorney in the position of a third party intercepting and surreptitiously recording the conversation. This position is evidently in accord with the public policy and law of the State of California for that state's Legislature in enacting Section 632 stated "eavesdropping on or recording confidential communications" require that *all* parties must consent to the recording before such interception would be legal.

Conclusion.

It is submitted that this Petitioner presents issues of vital private and public concern. There is no question that Petitioner's right of privacy was invaded and that invasion, at the time of trial, was in violation of state and Federal penal statutes.

Further, that the trial court, the Appeal Court and the Supreme Court of the State of California failed to act within their discretion to protect Petitioner's in-

dividual Constitutional rights, to observe that due process be afforded by a fair trial being conducted in civil matters, and that illegal evidence, which is the very crux in the instant case of a crime, not be allowed to be introduced as evidence, and particularly in this case where it is the heart of the court's opinion fixing liability.

To these ends, it is respectfully requested that this Petition be granted.

Respectfully submitted,

ROBERT W. HUGHES,
Attorney for Petitioner.

Of Counsel:
RICHARD T. OLSON,

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Carolyn R. Judd, Plaintiff and Respondent, v. Don A. Jenks, Defendant and Appellant. 2D Civil No. 40945, (Sup.Ct.No. 914 620).

Filed: Sept. 21, 1973.

APPEAL from judgment of the Superior Court of Los Angeles County. James D. Tante, Judge. Affirmed.

Richard T. Olson, Esq., for Appellant.

Messrs. Green, Seuthe & Royce, by Carol E. Freis, for Respondent.

Don Jenks appeals the judgment against him for $6,000 damages and $2,000 exemplary damages in an action for fraud brought by respondent Carolyn Judd. Jenks concedes that another defendant, Aubrey Morgan, may have defrauded Judd in a stock sale, but he contends the evidence fails to prove he, Jenks, participated in the fraud.

THE EVIDENCE

Jenks lives in Utah where he is a salesman and an investor in land and stocks. In 1965 he purchased a 2 percent interest in some mining claims in Lemhi County, Idaho, for $2,000. He then traded the mining interest to Thorium Reactor Corporation (TRC) in return for 120,000 shares of $.50 par value TRC stock. His actual investment was thus less than two cents per share. Around Christmastime in 1966 Jenks met Morgan in Salt Lake City. Jenks testified that

Morgan was in a "destitute position" and did not have a car. Jenks told Morgan that he was interested in some thorium claims in Idaho and mentioned TRC. Morgan said if he had some stock he could get a car, so Jenks gave him 2,000 shares of his TRC stock.

Later, in 1967, Jenks sold Morgan another 2,000 shares of his TRC stock at $.50 per share. Jenks took Morgan's promissory note for the purchase price. He told Morgan about TRC, that the officers of TRC thought the thorium claims were good, and he showed Morgan clippings about thorium from TIME magazine, the WALL STREET JOURNAL, and other periodicals. Jenks had panned for gold in Idaho and found some gold nuggets. Morgan paid Jenks only $50 on the promissory note.

On 23 March 1967 Judd was introduced to Morgan by a friend in Hollywood. Morgan wanted to sell Judd stock in a thorium mine. He said the company, named Thorium, owned a mine in Idaho containing thorium, gold, and silver. The Atomic Energy Commission was interested in Thorium. Morgan showed her a bottle of chipped gold which he said came from the mine. Morgan said he was one of the owners of the mine and he was in Los Angeles to negotiate with Litton Industries about developing the mine. He showed Judd magazine clippings about thorium and about property he said TRC owned. Morgan felt the stock had a value of $1 per share and he would sell it for that price. In May or June the stock was likely to go public at $10 a share and would take off fast.

Based on Morgan's representations, Judd agreed to purchase 6,000 shares of TRC at $1 per share from Morgan. She paid him $6,000. In May 1967 Morgan gave her 3,000 shares, but he never delivered the remaining 3,000 shares. He told her he had lost the other 3,000 shares and was getting a replacement certificate. In June 1967 Judd received a letter announcing a TRC Board meeting in Idaho and offering to sell additional shares of TRC stock to the shareholders at $.50 per share. In July 1967 Judd discovered that the representations made by Morgan were untrue. The stock was worthless. She filed suit for fraud and rescission.

Before being served with the complaint Morgan and Jenks met with Judd's attorney at the attorney's office. Jenks told the attorney he would help Morgan get the money to pay Judd back: "I gave him the stock in the first place. * * * The only reason I'm interested in getting him out of it is so that I won't get in trouble. * * * I just don't want any damned investigation with the SEC. * * * I lent him stock to help him out, see, but he gave me a note at the rate of a buck a share. * * * I don't want any trouble because I'm going to raise money for this company. * * * I'm trying to help this guy get the dough and then I want my stock back, that's all."

Jenks testified that he planned to help TRC raise about $100,000 by selling shares in Hawaii. He sold some shares in Hawaii for $2.50 a share, but he never gave the money to TRC.

DISCUSSION

We find the evidence sufficient to support the judgment on the grounds of either joint venture or conspiracy.

A joint venture is an association of persons formed to engage in a business enterprise and to share its profits and losses. The venture may be formed by oral agreement, and its existence may be assumed as a reasonable deduction from the acts and declarations of the parties. Where one joint adventurer, acting within the scope of the venture and in furtherance of its agreed purpose, is guilty of fraud in procuring benefits which are retained by the joint adventurers, all are liable for the fraud. (*Rickless v. Temple*, 4 Cal.App.3d 869, 893-894.) A reasonable inference from the facts and circumstances of this case is that Jenks and Morgan entered into a joint venture to sell TRC stock. Jenks gave Morgan some of the stock, which both knew to be worth only pennies, and sold him the rest for a promissory note at $.50 a share. If Morgan could sell the stock for more than $.50 a share he would use some of the money to repay the note. Both Jenks and Morgan would profit handsomely. Jenks was therefore liable to Judd for the fraud practiced by Morgan in furtherance of the joint venture.

The same facts permit the inference that Morgan and Jenks conspired to defraud Judd. A conspiracy may be inferred from the nature of the acts done, the relations of the parties, the interests of the conspirators, and other circumstances. (*Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal.2d 305, 316.) Jenks need not have known exactly who Morgan was going to defraud nor have participated directly in

the transaction, as long as he provided Morgan with the stock and the phoney sales pitch to be used on unsuspecting buyers. (*Massei v. Lettunich*, 248 Cal. App.2d 68, 73.) That Jenks knew Morgan would defraud someone with the stock he gave him was clear. Jenks testified that he gave Morgan 2,000 shares of TRC for Morgan to purchase a car, yet by Jenks own testimony he knew the stock was worth only a few dollars altogether.

Beeman v. Richardson, 185 Cal. 280, is on point. By false representations Richardson induced Beeman to purchase stock of a failing corporation owned by Richardson and other defendants. Said the Supreme Court with equal persuasiveness to the facts of this case:

"The point in connection with the finding as to a conspiracy is that the representations were made by the defendant, Richardson, alone, and that there is no direct evidence that the other defendants agreed that they should be made, or knew at the time that they were being made. But direct evidence of that character could hardly be had in the very nature of things, unless one of the defendants should confess, and the fact must be determined by the inference naturally and properly to be drawn from those matters which can be, and are directly proven. The inference of a joint fraud is, of course, not one to be lightly drawn, and can only be drawn in case the facts in evidence are sufficient to overcome the presumption against wrongdoing. But in this case the evidence showed directly that the sale to the plaintiff was made pursuant to an agreement among the defendants in advance, that is, that the making of the sale was a joint undertaking, and also showed a situation such as to justify the inference that the de-

fendants other than Richardson either knew of the representations which the latter was employing to effectuate their common purpose, or, what is the same thing in legal effect, knew that some kind of imposition was being practiced by him for that purpose without informing themselves as to exactly what it was." (185 Cal. at 282-283.)

The judgment is affirmed.

NOT FOR PUBLICATION

Fleming, *J.*

We concur:

Roth, *P. J.*

Compton, *J.*

APPENDIX B.

Order of the Supreme Court of California.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

November 15, 1973

I have this day filed order: Hearing Denied. In re: 2 Civ. No. 40945. Judd v. Jenks.

Respectfully,

G. E. Bishel, Clerk

APPENDIX C.

California Penal Code.

§ 630. *Legislative finding and intent*

The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society.

The Legislature by this chapter intends to protect the right of privacy of the people of this state.

§ 632. *Eavesdropping on or recording confidential communications*

(a) *Prohibited acts; punishment; recidivists.* Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential communication, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punishable by fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding three years, or by both such fine and imprisonment in the county jail or in the state prison. If such person has previously been convicted of a violation of this section or Sections 631 or 636, he is punishable by fine

not exceeding ten thousand dollars ($10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding five years, or by both such fine and imprisonment in the county jail or in the state prison.

(b) *Person.* The term "person" includes an individual, business association, partnership, corporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording such communication.

(c) *Confidential communication.* The term "confidential communication" includes any communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

(d) *Evidence.* Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding.

APPENDIX D.

Federal Statutes.

U.S.C. 18 § 2511. *Interception and disclosure of wire or oral communications prohibited*

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;